PP

v.

SHAHRUL AZUWAN ADANAN & ANOR

HIGH COURT MALAYA, SHAH ALAM
ABDUL RAHMAN SEBLI J
[CRIMINAL APPEALS NO: 41H, 282, 283, 284, 285, 286, 287, 288, 289, 290-07-2012, 345-09-2012]
18 OCTOBER 2012

ANIMALS: *Domestic animal - Ill-treatment - Accused running cat boarding business - Cats either missing or in deplorable conditions - Whether causing unnecessary pain or suffering to animals - Whether accused fell within definition of 'person' or 'owner' - Animals Act 1953, s. 44*

CRIMINAL PROCEDURE: *Plea of guilty - Mitigating factors - Whether Magistrate had authority to pass sentence of imprisonment without first giving option of paying fine - Whether sentence passed sufficient punishment*

CRIMINAL PROCEDURE: *Sentencing - Deterrence - Public interest - Cruelty to animals - Whether cruel act warrants custodial sentence - Whether sentence commensurate with seriousness of offence and reflect degree of public disapproval - Factors considered in enhancing sentence*

The respondents were running a cat boarding business. The owners had entrusted their cats under the respondents' care and upon returning to collect their cats, the owners were astounded to find their pets either missing or were in deplorable conditions. Eight cats had also died and were believed to have been starved to death. Police reports were lodged and the respondents were charged at the Magistrate's Court with 30 counts of cruelty to animals under s. 44(1)(d) of the Animals Act 1953 ('the Act'). The respondents pleaded guilty to all the charges and were hence convicted by the court. In passing sentence, the Magistrate considered the mitigating factors and in reliance of s. 44(2) of the Act, concluded that she had no authority to pass any sentence of imprisonment without first giving the respondents the option of paying fine. Accordingly, the Magistrate omitted to pass any custodial sentence and instead imposed the maximum fine of RM200 in default one month imprisonment on each of the charges. The prosecution appealed against inadequacy of sentence

A and the primary questions that arose were whether the Magistrate was right in her interpretation of s. 44(2) of the Act, and if so whether the sentence passed on the respondents constituted sufficient punishment for what they had done to the cats.

B **Held (allowing appeal and enhancing sentence):**

(1) The learned Magistrate had misconstrued s. 44(2) of the Act as the proviso only applies to owners of animals and not to others and certainly not to the respondents who were in the business of looking after other people's cats for a fee. They C cannot take cover behind the proviso to avoid custodial sentence. Thus, they can be sentenced to jail without first giving them the option of paying a fine. It appeared that the learned Magistrate was minded to pass imprisonment sentence but due to her erroneous interpretation of s. 44(2) of the Act, D she decided against passing such sentence as she felt constrained by the law from doing so. (para 10)

(2) There is no hard and fast rule as to what an appropriate sentence is or should be. It must depend on the facts and E circumstances of each particular case. Where the law does not fix the penalty for the offence, there will always be disparity in the sentences passed by the courts for the simple reason that different facts and different circumstances call for different considerations. (para 12)

F

(3) Where the interest of the public and the interest of the offender collide, the interest of the public must take precedence over the interest of the offender. Although they pleaded guilty and there were mitigating factors entitling the G respondents to due discount, the court must draw a line between sympathy for the respondents and the need to deter others from becoming copycats especially where as in this case, there was no mitigation to the crime itself. In cases involving cruelty to animals, it must be made clear to the H public that such act is a crime like any other crime and will not be tolerated by the court. (para 21)

(4) The sentence was manifestly inadequate and did not reflect public abhorrence for this type of criminal behaviour. The I respondents' act warrants a custodial sentence. A sentence must have the effect of deterring not only the offender from repeating the same offence but also others from following his footsteps. The sentence must commensurate with the

seriousness of the offence and must reflect the degree of public disapproval for that particular type of criminal behaviour. The more repulsive the criminal behaviour, the more severe the sentence should be. The measure of public disapproval is how the reasonable men and women on the street would react to the criminal conduct the offender is guilty of. (paras 16, 17 & 21)

(5) The punishment for animal cruelty under the Act is archaic and out of touch with reality. Despite having revised the Animals Ordinance 1953 by the present Act, the penalty for animal cruelty as provided by s. 44(1) has remained stagnant for the past 59 years. Having to pay a fine of RM200 in 1953 would probably hurt the pocket but to pay the same amount in 2012 is not even a slap on the wrist for businessmen like the respondents. It cannot be the case that cruelty against animals is viewed less seriously than it was in 1953. The need to increase the penalty for animal cruelty, in particular the sentence of fine, is long overdue. (para 25)

(6) The respondents' act warrants custodial sentence. Their callous disregard for the well being of the cats had left 8 of them dead and 22 others suffering. In the circumstances, this court would sentence the respondents to three months' imprisonment for each offence in addition to the sentence of fine already imposed in the lower court. The imprisonment sentence is to take effect from today and is to run concurrently. (para 22)

Case(s) referred to:
R v. Bull 35 Cr App R 164 ***(refd)***

Legislation referred to:
Animals Act 1953, ss. 2, 44(1)(d), (2)
Criminal Procedure Code, ss. 2(1), 183A

For the prosecution - Ahmad Ishrakh Saad, DPP
For the respondents - Syarifulnizam Shahruddin; M/s Syariful Nizam & Partners

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli J:

The charge

[1] In the Magistrates Court the respondents were charged with 30 counts under s. 44(1)(d) of the Animals Act 1953 ("the Act") for cruelty against 30 cats under their care. They pleaded guilty to the charges and were sentenced to a fine of RM200 in default one month imprisonment for each charge. They paid the fine. The prosecution dissatisfied with the sentence and now appeals for the sentence to be enhanced.

The Facts

[2] The two respondents were carrying on a cat boarding business under the style and name of "PETKNODE ONLINE PET STORE" located at No. F0001B Level 1, Season Square Plaza, Jalan PJU 10/3 Damansara Damai. The fees for their services were paid online. In an online promotional posting the respondents proudly proclaimed: "We are always committed to make sure that your cat gets more with our Good Care services".

[3] This catchy punch line turned out to be just that – a catchy punch line. The cat owners in the present case had left their cats under the care of the respondents when they returned to their kampongs for the 2011 Hari Raya celebration. Food for the cats were provided by the owners themselves. When they returned to take back their cats they were shocked to find that their pets were either missing or were in deplorable conditions and the cat food remained untouched. Eight of the cats subsequently died. Police reports were then lodged against the respondents, which led to the present charges.

The Offence

[4] Section 44(1)(d) of the Act which creates an offence of animal cruelty provides as follows:

> (1) any person who:
>
> (d) by wantonly or unreasonably doing or omitting to do any act, causes any unnecessary pain or suffering, or, being the owner, permits any unnecessary pain or suffering to any animal;

> … shall be guilty of the offence of cruelty and shall be liable to fine of two hundred ringgit or to imprisonment for a term of six months or to both.

[5] There are two limbs to the section, namely:

(a) any person who by wantonly or unreasonably doing or omitting to do any act, causes any unnecessary pain or suffering to any animal;

(b) any person who, being the owner, permits any unnecessary pain or suffering to any animal.

[6] The first limb is aimed at any person who by any act or omission causes unnecessary pain or suffering to any animal. The second limb on the other hand is aimed at owners who permit unnecessary pain or suffering to their animals. It is important to appreciate the distinction because an offence committed by "any person" under the first limb is distinct from an offence committed by "the owner" under the second limb. The gravamen of the offence under the first limb is to "cause" unnecessary pain or suffering to any animal whereas under the second limb the offence is to "permit" the animals to suffer unnecessary pain or suffering. It is in this context that the word "owner" in s. 2 and in sub-s. 44(2) of the Act must be understood. The fact that s. 2 of the Act begins with the words "In this Act, unless the context otherwise requires" is not without significance.

[7] In the present case it is clear that the respondents were charged under the first limb as all 30 charges referred to them as "orang yang bertanggungjawab memberi perkhidmatan dan penjagaan". If the public prosecutor had intended to charge them under the second limb the respondents would have been cited as owners who "permitted" the cats to suffer pain and suffering. In this case there was no such citation in any of the charges. I am therefore unable to accede to learned counsel for the respondents' argument that the respondents were owners of the cats within the meaning of s. 2 of the Act.

The Magistrate's Grounds Of Sentencing

[8] In passing sentence the learned magistrate referred to the general principles of sentencing. Specifically she referred *R v. Bull* 35 Cr App R 164, the *locus classicus* on point where the court laid

down the principle that "in deciding the appropriate sentence the first and foremost consideration is the public interest". She also considered the mitigating factors submitted by counsel for the respondents. The learned magistrate then directed her mind to the provisions of sub-s. 44(2) of the Act which reads:

> S. 44(2) for the purposes of this section an owner shall be deemed to have permitted cruelty within the meaning of this part if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal from cruelty:
>
> Provided that where an owner is convicted of permitting cruelty within the meaning of this Act by reason only of his having failed to exercise such care and supervision, he shall not be liable to imprisonment without the option of a fine.

[9] Relying on the proviso to the section the learned magistrate concluded that she had no authority to pass any sentence of imprisonment without first giving the respondents the option of paying a fine. Accordingly, she omitted to pass any custodial sentence and proceeded to impose the maximum fine of RM200 in default one month imprisonment for each offence.

[10] With due respect to the learned magistrate she had misconstrued the proviso. The proviso only applies to owners of animals and not to others and certainly not to the respondents who were in the business of looking after other people's cats for a fee. They cannot take cover behind the proviso to avoid custodial sentence. Thus they can be sentenced to jail without first giving them the option of paying a fine. From her grounds of sentencing it appears that the learned magistrate was minded to pass imprisonment sentence but due to her erroneous interpretation of the proviso to s. 44(2) of the Act, she decided against passing such sentence as she felt constrained by law from doing so.

Whether Sentence Should Be Disturbed

[11] The general principle is that an appellate court will be slow to interfere with the sentence passed by the lower court unless the sentence is illegal or manifestly inadequate or excessive or that the sentencing judge or magistrate had considered irrelevant factors or had given insufficient or undue weight to some of the

facts. However the appellate court will interfere if the sentence is not appropriate, not fitting to the circumstances of the crime and does not reflect public abhorrence or disapproval for that particular type of criminal conduct.

[12] There is no hard and fast rule as to what an appropriate sentence is or should be. It must depend on the facts and circumstances of each particular case. Where the law does not fix the penalty for the offence there will always be disparity in the sentences passed by the courts for the simple reason that different facts and different circumstances call for different considerations. Thus the sentencing magistrate may rightly decide that a pauper who steals food out of hunger may be dealt with less severely than a rich man who steals out of greed even though they are charged for the same offence.

[13] In passing sentence it is natural for the sentencing judge or magistrate to be sympathetic towards the offender. Invariably the offender cuts a lonely figure as he stands alone and subdued in the dock to face punishment. His demeanour, where he is charged with a crime involving the use of violence will be in total contrast with his conduct at the time he committed the offence. His plea in mitigation can sometimes be loaded with emotion, pleading all the usual problems of life. In such situation it is very easy to be swayed by sympathy but this is where the court must stand firm and not shirk from its responsibility to deal properly with evildoers.

[14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.

[15] It is comforting to note that the Criminal Procedure Code ("the CPC") has recently been amended by adding a new s. 183A which came into force on 1 June 2012 and which allows for the victim's impact statement to be taken into consideration before the court passes sentence. This will give the court a sense of what the victim or his family went through as a result of the offender's transgressions into their private lives and to pass the appropriate sentence accordingly. Parliament in its wisdom had deemed it fit to insert this provision under Chapter XX of the CPC which deals with trials before the High Court but in my view the provision is meant for all courts as the word "court" is defined by s. 2(1) of the CPC to mean the High Court, a Sessions Court, or a Magistrates Court of any class. Indeed it is in the lower courts that impact statements are most needed, given the type of cases that go before these courts.

[16] A sentence to be of any use must have the effect of deterring not only the offender from repeating the same offence but also others from following his footsteps. The sentence must commensurate with the seriousness of the offence and must reflect the degree of public disapproval for that particular type of criminal behaviour. The more repulsive the criminal behaviour the more severe the sentence should be. The measure of public disapproval is how the reasonable men and women on the street would react to the criminal conduct the offender is guilty of.

[17] The question in the present appeal is whether the sentence passed on the respondents is sufficient punishment for what they had done to the cats. I must say at the outset that the sentence is manifestly inadequate and does not reflect public abhorrence for this type of criminal behaviour. Eight of the cats died miserable deaths at the hands of the respondents. Among the causes of death as determined by the veterinary officer was "undernourishment, resulting in organs shut-down resulting in death". In simple language that means the cats were starved to death.

[18] Of the cats that survived the ordeal, a Persian named "Fat Fat" suffered from serious nasal discharge. Two other cats, namely "Pipi" and "Co'et" were diagnosed by the veterinary officer as suffering from "trauma" and were vomiting white cloudy liquid.

As for the rest of the cats, including "Mimimeeoww", "Tompok", "Timah" and "Popeye" just to name a few, they did not fare any better either. Apart from being dehydrated they were thin, foul smelling, very dirty and soiled with urine. The earlobes of some of the cats were beginning to be infected with ringworm and they were also suffering from acute diarrhea (cirit-birit) and were shivering. In addition to that the soles of their feet had turned reddish due to "urine burn".

[19] What the respondents did to the cats is unacceptable. Despite being paid for their services they did not even bother to feed the cats, let alone to take care of them while allowing them to remain caged throughout the duration of their stay at the cattery. It is an irony that in pleading for leniency the respondents told the court that they were traumatized by the case, as if their act of traumatizing the cats and their owners did not matter at all.

[20] It is high time the courts take a serious view of the offence of cruelty against animals before apathy sets in, if it has not already set in. Animals need care, love and affection as humans. Like humans they do feel pain and suffering but unlike humans they endure the pain and suffering quietly. It is not uncommon to see animals, particularly strays at quiet corners licking their wounds inflicted by humans. It is a shame to call ourselves human if we cannot even treat animals humanely.

[21] The principle is clear. Where the interest of the public and the interest of the offender collide, the interest of the public must take precedence over the interest of the offender. Undeniably there were mitigating factors in favour of the respondents. They pleaded guilty to the charges although not at the first available opportunity, were first offenders and were remorseful. Due discount must be given for these mitigating factors but the court must draw a line between sympathy for the respondents and the need to deter others from becoming copycats especially where as in this case there is no mitigation to the crime itself. In cases involving cruelty to animals it must be made clear to the public that such act is a crime like any other crime and will not be tolerated by the court.

[22] For reasons aforesaid I find merit in this appeal by the Public Prosecutor. In my view the respondents' act warrants a custodial sentence. Their callous disregard for the well being of the cats had left 8 of them dead and 22 others suffering. In the circumstances I order that the respondents be sentenced to three months imprisonment for each offence in addition to the sentence of fine already imposed by the lower court. The imprisonment sentence is to take effect from today and is to run concurrently. In my view the additional three months concurrent imprisonment sentence is appropriate considering that the respondents faced not one but 30 cruelty charges.

Postscript

[23] As a postscript it has to be said that the punishment for animal cruelty under the Act is archaic and out of touch with reality. When the Animals Ordinance (No. 17 of 1953) was enacted 59 years ago in 1953 the penalty for animal cruelty as provided by s. 44(1) was as follows:

> … a fine of two hundred dollars or to imprisonment for a term of six months or to both.

[24] When the Ordinance was revised 53 years later in 2006 by the present Act (Act 647), the penalty for animal cruelty as provided by s. 44(1) was as follows:

> … a fine of two hundred ringgit or to imprisonment for a term of six months or to both.

[25] No prize for spotting the difference but it will be interesting to see if anything will be done to rectify the situation. Having to pay a fine of two hundred dollars in 1953 would probably hurt the pocket but to pay a two hundred ringgit fine in 2012 is not even a slap on the wrist for businessmen like the respondents. If the two hundred dollars of 1953 were to be pegged against today's worth of two hundred ringgit, the fine of RM200 under the Act which has remained stagnant for the past 59 years will be more of a friendly pat on the back rather than a punishment. It cannot be the case that cruelty against animals is viewed less

seriously today than it was in 1953. In my view the need to increase the penalty for animal cruelty, in particular the sentence of fine is long overdue. A substantial increase will at least give some semblance of protection to these poor defenceless creations of God.